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Highlights

— ICA accepts commitments offered by parties to alleged anticompetitive agreement in scrap automotive and industrial lead-acid batteries sector

— TAR Lazio annuls ICA decision fining telecom operators for their participation in alleged "repricing" cartel

ICA accepts commitments offered by parties to alleged anticompetitive agreement in scrap automotive and industrial lead-acid batteries sector

On June 15, 2021, the Italian Competition Authority (the "**ICA**") adopted a decision that made legally binding the commitments offered by certain companies active in the scrap lead-acid batteries sector, in the context of an investigation regarding the alleged coordination of their pricing behavior.[1] These commitments were found to adequately address the ICA's concern that the companies and the collecting organizations they belonged to may have coordinated their behavior in violation of Article 101 TFEU.

Background

The ICA procedure concerned the purchase of used automotive and industrial lead-acid batteries, which, once they have reached their end of life, are collected and recovered to extract the lead in them and convert it into a new resource (recycled or "secondary" lead, as opposed to "primary" lead, which is obtained from mining). Secondary lead currently represents the main production input for the manufacture of new lead batteries.

Players in this industry are active at the following stages of the production chain:

i. scrap collectors collect lead waste. Collectors buy spent lead-acid batteries from waste holders (primarily mechanical workshops and car parts shops) on the market;

ii. smelters and integrated manufacturers perform treatment and recycling activities. They convert the waste stockpiled by collectors into secondary lead so that manufacturers can reuse it to produce new batteries; and

[1] See ICA Decision of June 15, 2021, No. 29718, Case I838, *Restrizioni nell'acquisto degli accumulatori al piombo esausti* (the "**Decision**"). Lead-acid batteries include automotive batteries and industrial batteries.

iii. intermediaries between collection and recycling. This activity is performed by collection and treatment systems, to which, by law, producers and importers selling batteries on the Italian market must belong.

Under the current regulatory framework, producers and importers of batteries (or third parties acting on their behalf) are responsible for managing the collection, treatment and recycling of waste batteries, and must bear the cost of waste treatment and collection.[2] Collection systems purchase waste from collectors and sell it to integrated manufacturers and smelters, or deliver it to smelters under processing contracts and sell it after the conversion process is complete.

The ICA investigation

In July 2019, Ecodom, a consortium grouping the main producers of major domestic appliances active in Italy, filed a complaint with the ICA, which four months later initiated proceedings. The investigated entities were: (i) several players in the scrap batteries recycling sector, namely, Fiamm Energy Technology S.p.A. ("**Fiamm**"), Clarios Italia S.r.l. ("**Clarios**"), Eco-bat S.r.l. ("**Eco-bat**"), Piomboleghe S.r.l. ("**Piomboleghe**"), Piombifera Italiana S.p.A. ("**Piombifera**"), E.S.I. Ecological Scrap Industry S.p.A. ("**ESI**"), and S.I.A.P.R.A. S.p.A. ("**SIAPRA**"; collectively, the "**Parties**"); and (ii) consortia COBAT RIPA ("**COBAT RIPA**") and COBAT SERVIZI ("**COBAT**" and, together with COBAT RIPA, the "**COBAT system**").[3] The COBAT system is a collecting organization which sells part of the waste it collects to its own smelters in tender proceedings that are reserved for them. It initially operated as the sole consortium in Italy; however, as a result of the liberalization that took place under Italian Legislative Decree No. 188/2008, it started competing with other collection systems. Today COBAT is still the main system for the collection of spent lead batteries for automotive and industrial uses.

The Decision

The relevant markets

The ICA defined the relevant market as the national market for scrap lead-acid batteries for automotive and industrial uses, with COBAT and the other collection systems on the supply side and smelters and integrated manufacturers on the demand side.

Other markets that may have been potentially affected by the conduct under investigation were those for the provision of intermediation services in the scrap batteries sector, where the collection systems compete, and for the collection of scrap batteries.

The ICA ultimately left the exact definition of the relevant market(s) open since it accepted the commitments proposed by the Parties (see below).

The theory of harm

In the decision to initiate proceedings, the ICA alleged that smelters and integrated manufacturers coordinated their behavior within the COBAT system, in violation of Article 101 of the TFEU, with a view to: (i) setting and maintaining artificially low purchase prices for the scrap batteries offered to COBAT members; and (ii) preventing effective competition between consortia for the sale of their batteries, thus foreclosing competing collection systems from the market.

According to the ICA, this exclusionary strategy concerned, first, negotiations between COBAT and the collectors and included the use of confidential information on the supply points of the collectors. The alleged collusive conduct of these undertakings involved setting the purchase prices for scrap lead batteries, differentiated according to the origin of the waste; and increasing the flow of waste that was guaranteed to the members of COBAT.

[2] Under Article 7 of Legislative Decree No. 188/2008, producers and importers of batteries must organize and finance waste collection and treatment either individually or by joining a so-called "*collective system*" operating through its own logistics and processing network. Each collective system is financed by at least two producers or importers and must be able to operate throughout the country.

[3] ICA Decision of December 3, 2019, No. 28015, Case I838, *Restrizioni nell'acquisto degli accumulatori al piombo esausti*. The scope of the ICA investigation was later extended by Decision of May 20, 2020, No. 28245.

Moreover, in the ICA's view, smelters, within the consortium bodies of COBAT RIPA/COBAT, influenced the process of setting the base price of the periodic auctions conducted by the COBAT system. In particular, the ICA alleged that COBAT's executive committee and board actively participated in setting the general policy with a view to lowering the purchase and sale prices for scrap batteries. Moreover, the Parties allegedly allocated the various tender lots among themselves so that each smelter would submit bids only for lots for which the other undertakings did not bid, based on a geographic allocation criterion, so as to prevent auction base prices from increasing as a result of competitive bids. This was possible because only national recyclers that were members of COBAT could participate in the tender proceedings, thus excluding Italian smelters that were not COBAT members as well as foreign smelters.

Finally, the ICA took the preliminary view that, within the COBAT system, the Parties may have shared commercially sensitive information and agreed not to purchase used lead batteries from competing collection systems, as well as jointly set differentiated environmental contributions for the various categories of producers/importers and smelters belonging to the COBAT system.

The commitments proposed by the Parties

On February 8, 2021, COBAT RIPA, COBAT, Fiamm, Siapra, Clarios, Eco-bat, Piomboleghe, and Piombifera submitted to the ICA a set of joint commitments pursuant to Article 14-*ter* of Law No. 287/1990.

i. First, COBAT will be transformed into a joint-stock company and each of the smelters will divest the shares it will hold in the new entity. The purpose of the new corporate form is to ensure a more significant opening of COBAT's activities to third parties since COBAT will have to pursue the objective of maximizing its profits in managing the collection of scrap batteries and their sale to smelters, producers and importers. As a result of the share divestment process, COBAT will operate as a system of producers only, as is the case for other collecting organizations active in the used lead batteries sector. In the ICA's view, this structural remedy will effectively eliminate the conflict of interest within COBAT in the allocation of scrap batteries, arising from the presence of all the main smelters operating in Italy, that is, the main purchasers of the scrap batteries collected and allocated by the COBAT system itself on that market. As such, the commitment in question was found adequate to ensure competition between producers and smelters.

ii. Secondly, COBAT committed to carry out the tenders according to criteria of competition and efficiency. 100% of the scrap batteries collected directly by COBAT will therefore be allocated exclusively through periodic electronic auctions open not only to smelters, but to all undertakings having the necessary authorizations. Moreover, the auction-based prices in electronic auctions and the prices that collectors are charged will be set exclusively by COBAT's commercial and administrative staff, whereas COBAT's and COBAT RIPA's executive bodies (Board of Directors and Executive Committee) will cease being involved in setting prices and other economic conditions relating to the purchase and sale of scrap batteries.

iii. Thirdly, COBAT, Fiamm, Clarios, Eco-bat, Piombifera and Piomboleghe committed to insert in the by-laws of the newly-established company a provision aimed at limiting access to sensitive information by members of the Board of Directors. Pursuant to such provision, the said undertakings and their representatives on the Board of Directors may not, under any circumstances, access documents or information concerning the bids submitted, the prices charged by competitors, the quantities of spent batteries assigned, the treatment capacity of the recyclers, or the quantities of spent batteries collected by the COBAT system. This commitment aims at preventing COBAT from being the forum in which agreements between competitors are reached, thereby remedying the concern regarding the possible sharing

of sensitive information between consortium members within COBAT.

iv. Fourthly, the provision in COBAT's bylaws pursuant to which COBAT members must purchase scrap batteries only from COBAT will be repealed *vis-à-vis* not only smelters, but also producers and importers. As a result, producers and importers will no longer be obliged to operate exclusively through the collecting system to which they belong.

v. Finally, COBAT committed to ensure that the information it receives from collectors is limited to information that is essential to track scrap batteries and to comply with environmental law obligations.

Based on the comments expressed in the course of the market test by another consortium, EcoPower, the Parties offered a further commitment, *i.e.*, to adopt an antitrust compliance program and hire an antitrust compliance officer who would periodically report to the ICA until 2025.

In the Decision the ICA found the above commitments to be sufficient to overcome its competitive concerns at the outset of the investigation, and made them binding on the Parties, closing the procedure without a finding of infringement of Article 101 TFEU.

TAR Lazio annuls ICA decision fining telecom operators for their participation in alleged "repricing" cartel

On July 12, 2021, the Regional Administrative Tribunal for Latium (the "**TAR Lazio**") annulled the overall €228 million fines imposed by the ICA on Fastweb S.p.A. ("**Fastweb**"), Telecom Italia S.p.A. ("**TIM**"), Vodafone Italia S.p.A. ("**Vodafone**") and Wind Tre S.p.A. ("**Wind Tre**"; collectively, the "**Operators**") for an alleged cartel aimed at coordinating pricing strategies in the transition from a 28-day to a monthly billing period (so-called *repricing*).[4]

Background

Starting in 2015, the Operators informed their customers that the renewal and billing of telephone communication services would be carried out on a four-week basis (*i.e.*, every 28 days), as opposed to on a monthly basis, as before. This switch (which led to an 8.6% annual price increase) triggered a number of complaints from consumer associations, which argued that it was designed to conceal price increases in phone fees.[5]

In March 2017, the Italian Communications Authority ("**AGCom**") issued a resolution, requiring: (i) the billing period for landline telecommunications services to be brought back to one month; and (ii) the billing period for mobile telecommunications services to be no shorter than 28 days.[6] The Operators initially maintained the 28-day invoicing system for mobile phone services.

Subsequently, Article 19-*quinquiesdecies* of Law Decree No. 148/2017 (as converted into Law No. 172/2017) established invoicing periods of one month (or multiples of a month)

[4] See ICA Decision of January 28, 2020, No. 28102, Case I820, *Fatturazione mensile con rimodulazione tariffaria* (the "**Decision**"), and TAR Lazio Judgments Nos. 8233, 8236, 8239 and 8240 of July 12, 2021. For a report of the Decision, see Cleary Gottlieb, *Italian Competition Law Newsletter*, January 2020.

[5] For the sake of completeness, please note that in 2016 the ICA fined TIM, Wind and Vodafone for breach of Articles 20, 24 and 25 of the Italian Consumer Code. The ICA found the unilateral reduction of the billing period from 30 to 28 days to be an aggressive practice, since it was likely to limit the consumers' freedom of choice and their right of withdrawal, thus resulting in an economic burden for all consumers who did not agree with this change (see ICA Decision of July 27, 2016, No. 26134, Case PS10246, *Telecom-Rimodulazione piani tariffari 28 giorni*; ICA Decision of July 27, 2016, No. 26135, Case PS10247, *Wind-Rimodulazione piani tariffari 28 giorni*; and ICA Decision of December 21, 2016, No. 26307, Case PS10497, *Vodafone-Rimodulazione tariffaria da 30 a 28 giorni*).

[6] See AGCom Resolution No. 121/17/CONS of March 15, 2017.

for television network operators, telecom operators, and providers of services of electronic communications.

Against this background, at the beginning of 2018 the Operators sent simultaneous communications to their customers, informing them that – in compliance with Law No. 172/2017 – their phone services would from then on be invoiced on a 30-day basis instead of on a 28-day basis. The consequent transition from 13 to 12 annual invoices would entail an 8.6% increase in monthly fees, although the annual price for the services would remain unchanged.

The Decision

At the beginning of 2018 the ICA opened an investigation into the Operators' practices (the "**Investigation**") and, in April 2018, adopted on its own motion an interim measure, ordering the Operators: (i) to suspend, pending the Investigation, any coordination concerning repricing; and (ii) to define the terms of their offers independently of each other (the "**Interim Measure**").[7]

At the end of the Investigation, the ICA found that the Operators – also facilitated by the relevant trade association (Asstel) – unlawfully coordinated their conduct in the context of the implementation of Law No. 172/2017. In particular, in the ICA's view, their allegedly collusive conduct included: (i) the adoption of identical repricing in the transition to monthly billing; and (ii) the simultaneous communications sent by the Operators to their customers to inform them of the upcoming changes in invoicing. According to the ICA, the alleged conduct amounted to a single, complex and continuous secret collusive scheme aimed at preserving the existing price level and preventing customer mobility, thereby freezing the Operators' respective market shares and limiting competition.

The ICA noted that, following the implementation of Law No. 172/2017, the Operators were required to issue monthly invoices, but were free to determine whether and how to reprice the services offered to customers. However, the ICA found that, despite several alternative options being available, the Operators intentionally opted for the same strategy, by applying an identical monthly increase of 8.6%. In light of this "*focal point*" of the anticompetitive coordination, the ICA deemed that the remaining divergences in the amendments to the content of the Operators' offers (by which, for example, TIM and Wind Tre increased the content of their offers, whereas Fastweb and Vodafone did not) could not call into question the existence of collusion.

In imposing the overall €228 million fines, the ICA took into account the fact that the effects of the cartel had been avoided by the application of the Interim Measure, which led to a differentiated reduction in the prices applied by the Operators prior to the completion of the repricing. In addition, the ICA took into account the specific nature of the conduct within the context of the landline and mobile telecommunications markets, as well as the competitive conditions, in terms of both prices and the technological investments necessary to ensure the development of these markets. Accordingly, the ICA deemed it appropriate to depart from the general methodology for the setting of fines, as set out in its Fining Guidelines,[8] and reduced all fines imposed on the Operators by 70%.

The TAR Lazio rulings

The TAR Lazio totally annulled the Decision, finding that the ICA failed to meet the standard of proof required to establish anticompetitive conduct.

First, the TAR Lazio found that the ICA based its conclusions on unsuitable evidence. In particular, most of the internal documents relied upon by the ICA fell outside the temporal scope of the Investigation (dating back to a time prior to the start date of the alleged cartel, as established by the ICA itself). Accordingly, these documents

[7] See ICA Decision of April 11, 2018, No. 27112.

[8] See Guidelines on the method of setting pecuniary administrative fines pursuant to Article 15(1) of Law No. 287/90, §34.

could not be used in support of the ICA's findings against the Operators. Also, with regard to the remaining documents used in support of the Decision, the TAR Lazio held that they did not include any reference to "*repricing*", which in the ICA's view was the "*focal point*" of the alleged collusion. Accordingly, the Court held that the ICA failed to carry out an adequate investigation.

Secondly, the TAR Lazio held that the Decision lacked serious, precise and conclusive elements in support of the ICA's allegations, and failed to prove that the alleged collusion was the only possible explanation for the Operators' behavior. In this regard, the Court found that the Operators had provided an alternative plausible explanation for their meetings and exchanges of information, *i.e.*, that they were necessary in order to understand how to comply with the regulatory change, in addition to being the mere expression of the right of any economic operator to adapt intelligently to the existing and anticipated conduct of competitors.

The TAR Lazio found that this explanation was also supported by the opinion provided by AGCom during the Investigation (the "**Opinion**"). In the Court's view, although the Decision extensively quoted the Opinion, the ICA did not actually give adequate weight to the AGCom's views in assessing the lawfulness of the Operators' conduct. Indeed, according to the Opinion, the repricing was a direct consequence of the first transition from a monthly to a four-week billing, rather than the result of the subsequent transition back to monthly billing that occurred after the entry into force of Law No. 172/2017. Accordingly, such repricing was related to a period falling outside the scope of the Investigation, and could not be the basis for the Decision's theory of harm. Moreover, the TAR Lazio referred to the AGCom's view that price is not the only factor guiding consumers' choice to migrate to a competing telecom operator. Other relevant elements are the price level of comparable offers, as well as non-pricing elements such as the services included in the offer. Accordingly, in the Court's view, the Opinion established that the alleged anticompetitive purpose of the collusion, as established by the ICA – namely, the purported goal of limiting consumers' mobility – was groundless.

Thirdly, the TAR Lazio referred to the AGCom's view that in complex regulated markets, such as the electronic communications one, contacts and interactions among operators may often be necessary, *e.g.*, in the context of technical panels aimed at understanding how to implement regulatory provisions. In this regard, according to the Opinion, the entry into force of the new legislation was an incentive for the Operators, as part of the same industry, to establish lawful contacts with each other. Accordingly, the Court noted that the Opinion supported the alternative explanation put forward by the Operators, which the ICA had wrongly disregarded.

Finally, the TAR Lazio noted that, notwithstanding the fact that the ICA had classified the Operators' conduct as a restriction of competition by object (and, accordingly, deemed it unnecessary to examine its anticompetitive effects), the Opinion made clear that the transition to monthly billing did not have any effects with regard to consumers' mobility.

Other developments

TAR Lazio confirms ICA decision fining several companies for bid-rigging in private security services sector in Italy

On July 22, 2021, the TAR Lazio dismissed in full the applications filed by Coopservice s.coop.p.a. ("**Coopservice**"), Allsystem s.p.a. ("**Allsystem**"), Istituti di Vigilanza Riuniti s.p.a. ("**IVRI**") and its parent company Biks Group s.p.a. ("**Biks**"), Italpol Vigilanza s.r.l. ("**Italpol**") and its parent company MC Holding s.r.l. ("**MC Holding**"), as well as Sicuritalia s.p.a. ("**Sicuritalia**") and its parent company Lomafin SGH s.p.a. ("**Lomafin**"; collectively, the "**Parties**") for annulment of the 2019 decision adopted by the ICA in Case I821 (the "**Decision**").[9] In the Decision the ICA: (i) found that the Parties participated in a cartel affecting the outcome of several open tender procedures for the provision of private security services, launched by certain contracting authorities located in the regions of Lombardy, Emilia Romagna and Lazio between 2013 and 2017; (ii) ordered the Parties not to engage in similar conduct in the future; and (iii) fined the Parties more than €30 million overall.[10]

The Decision was the outcome of proceedings initiated in February 2018 following the ICA's receipt of several complaints of alleged bid-rigging. The scope of the investigation was subsequently extended to include alleged coordination in additional tenders for the award of security services to public and private entities,[11] and a "compensation scheme" whereby the Parties allegedly put in place a system of regular mutual assignments of services to regulate their relationships.[12]

In the ICA's view, the alleged cartel affected approximately 23% of the main tenders in which the Parties participated between 2013 and 2017 in Lombardy, Emilia Romagna and Lazio, where their activities tended to overlap. As found in the Decision, the contested practices constituted a restriction by object under Article 101 TFEU, comprising a single, complex and continuous anticompetitive scheme aimed at sharing lots among the participants and allowing them to retain their historical market shares.

In the judicial review proceedings before the TAR Lazio, the Court fully upheld the ICA's findings, confirming that the Parties had entered into a series of anticompetitive agreements aimed at coordinating their participation in some tenders, which were particularly important in terms of value and geographical scope, in areas where the Parties were historically active. The Parties had done so by using in an anticompetitive manner tools that would have otherwise been fully legitimate, such as a temporary consortium of undertakings, and recourse to subcontracting.[13]

In support of its ruling, the TAR Lazio referred to the case law under which anticompetitive conduct repeated by different undertakings over a certain period of time, comprising in part agreements and in part concerted practices, can amount to a single cartel. Consequently, a participant can be held liable for all actions of a cartel, even if it does not personally take part in all of them, once it has consented to the objective of the anticompetitive conduct itself.[14] In the TAR Lazio's view, even cartel members whose participation is limited (because they do not take part in all aspects of the anticompetitive conduct or they play a minor

[9] See TAR Lazio Judgments Nos. 8810, 8815, 8816, 8817 and 8825 of July 22, 2021.

[10] See ICA Decision No. 27993 of November 12, 2019, Case I821, *Affidamenti vari di servizi di vigilanza privata*. For a report of this decision, please see Cleary Gottlieb, *Italian Competition Law Newsletter*, December 2019.

[11] Such as Azienda Regionale Centrale Acquisti S.p.A., Trenord S.r.l., Expo 2015 S.p.A., Intercent-ER, and ATAC S.p.A.

[12] See ICA Decision No. 27192 of May 29, 2018.

[13] The TAR Lazio upheld the ICA's findings that, in some cases, the Parties participated in the tender with fictitious temporary consortia of undertakings, which concealed a geographical sharing of the lots; in other cases, before the tender, the Parties entered into opt-out agreements in which certain undertakings committed not to compete in exchange for the assignment of subcontracting quotas. In addition, the Parties regulated their relationships on a bilateral basis through the mutual assignment of security services, both in private and public tenders. Finally, in other cases, the agreement resulted in all the Parties refraining from participating in the tenders, again in the pursuit of the same common purpose of eliminating competition between them.

[14] See ECJ, C-49/92 P, *Commission* v *Anic partecipazioni*.

role in it), ultimately contribute to the overall infringement. In such a case, in order to establish the liability of a company that claims not to have participated in a cartel or to have played only a limited role, it is necessary to demonstrate both that it intended to contribute to the common objectives pursued by all participants and that it was aware of the planned conduct or was at least able to foresee it.[15]

The TAR Lazio found that the Decision fully addressed these issues, taking into account the dense network of interwoven and bilateral relationships in place between the Parties, which amply demonstrated that they were all aware of the objective of preserving their market positions and thus restrict competition.

The TAR Lazio also found that there was no reasonable justification, economic or otherwise, for the Parties' coordination, and that the ICA's calculation of the fines imposed on them had been correct.

TAR Lazio confirms ICA decision to fine the Italian Federation of Equestrian Sports for non-compliance with commitments and abuse of dominant position

On July 13, 2021, the TAR Lazio dismissed the application for annulment of a 2019 decision of the ICA (the "**Decision**") lodged by the Italian Equestrian Sport Federation ("**FISE**").[16]

The Decision established that FISE: (i) failed to comply with the commitments it offered to the ICA in 2011 in the context of a previous investigation (the "**Commitments**"); and (ii) abused its dominant position in the market for the organization of horse races and events having a professional, amateur or recreational nature, with a view to restricting the activities of competing operators with regard to the organization of amateur events.[17]

The Commitments, which the ICA had accepted and made binding on FISE, were aimed at preventing the Federation from limiting – through the regulatory powers it held in its capacity as the only national organization recognized by the Italian National Olympic Committee (CONI) for equestrian sport – the organization of amateur equestrian events.[18] In particular, FISE undertook to issue a new regulation aimed at clearly distinguishing amateur from professional equestrian activities, and to exercise its regulatory powers only with regard to the latter. In addition, FISE committed to refrain from obstructing the organization of amateur activities and events by competing operators.

According to the Decision, FISE breached the Commitments by *inter alia* introducing new restrictive regulations, and sending letters of formal notice to competing operators active in the relevant market (such as clubs and sports promotion bodies) that did not comply with such regulations. The ICA found that such conduct also amounted to an exclusionary abuse, in that it prevented competing operators from having access to the market for the organization of equestrian events. In light of the foregoing, the ICA fined FISE over €451,000.

In its ruling, the TAR Lazio dismissed all the grounds for annulment raised by FISE, both procedural and substantive, thus fully upholding the Decision.

[15] See *id.*, § 87. See also TAR Lazio Judgments Nos. 8500 and 8502 of July 25, 2016.

[16] See TAR Lazio Judgment No. 8326 of July 13, 2021.

[17] See ICA Decision of October 8, 2019, No. 27497, Case A378E, *Federitalia/Federazione italiana sport equestri (FISE)*. For a short report of this decision, please see Cleary Gottlieb, *Italian Competition Law Newsletter*, October 2019.

[18] ICA Decision of June 8, 2011, No. 22503, Case A378C, *Federitalia/Federazione italiana sport equestri (FISE)*.

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